

**NEWS**

NEW JERSEY DEPARTMENT OF

**LWD**

LABOR AND WORKFORCE DEVELOPMENT  
nj.gov/labor

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State of New Jersey

Department of Labor and

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**RE: Proposed Amendments  
N.J.A.C. 12:17-8.3, 8.4 and 12:2  
Division of Unemployment Insurance  
Unemployment Benefit Payments  
Reduction of Benefits by Retirement in Pension  
Income and Other Earned Income; Labor Disputes**

Attached please find the above-referenced matter which was published in the Monday, September 19, 2005 *New Jersey Register*.

If you have any questions, please contact David Fish, Regulatory Officer at 609-292-2789.

Submit written comments by November 18, 2005 to:  
 David Fish, Regulatory Officer  
 Office of Legal and Regulatory Services  
 Department of Labor and Workforce Development  
 PO Box 110, 13th Floor  
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The agency proposal follows:

#### Summary

The proposed amendments to N.J.A.C. 12:17-8.3 and 8.4 are prompted by an apparent inconsistency between the Department's rules pertaining to the reduction of unemployment benefits resulting from the receipt of pension payments and the opinion in *Giesler v. Board of Review*, 315 N.J.Super. 28 (App. Div. 1998). Specifically, N.J.A.C. 12:17-8.4(c) currently indicates that there will be no reduction of unemployment benefits when an individual transfers his or her eligible rollover distribution from a qualified trust to an eligible retirement plan. However, the court in *Giesler* held that where the Department is otherwise required under N.J.S.A. 43:21-5a to reduce the benefits payable to a claimant resulting from the claimant's receipt of a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment which is based on the previous work of such individual, the fact that, upon separation from employment, the claimant decided to "roll over" his or her retirement funds into an individual retirement account (IRA), does not exempt the claimant from the requisite reduction of unemployment benefits. According to the court, the fact that the claimant does not "actually receive" the pension benefits does not change the resulting reduction of unemployment benefits, because it was the claimant's "personal decision not to receive the funds and to place them into his IRA account." *Id.* at 32. The purpose of the "pension offset statute" (N.J.S.A. 43:21-5a), the court ruled, is to prevent an individual who is retired from employment or who is involuntarily and permanently separated from employment at a time when he or she is entitled to full pension benefits from collecting both unemployment benefits and retirement benefits based on the same prior work period. The court concluded, therefore, that if the appellant in *Giesler*, who had been permanently and involuntarily terminated from his employment, who at the time of his termination "could have retired with full pension rights," and who had rolled over his lump sum pension benefit into an IRA account, were to prevail in his challenge of the reduction of his unemployment benefits, the purpose of N.J.S.A. 43:21-5a would be defeated. As a result of the holding in *Giesler*, the Department is proposing that N.J.A.C. 12:17-8.4(c) be deleted.

In addition, the Department's examination of N.J.A.C. 12:17-8.3 prompted by the holding in *Giesler* has raised concerns with regard to the use within N.J.A.C. 12:17-8.3(b) of the term "involuntarily" when describing an individual's separation from employment and the phrase, "without penalty to his or her pension rights." Based on those concerns, which are discussed in detail below, the Department is proposing that within N.J.A.C. 12:17-8.3(b) the phrase, "date at which the individual may retire without penalty to his or her pension rights, replaced with the phrase, "date at which the individual may retire with full pension rights." The Department is proposing this amendment in order to ensure consistency with N.J.S.A. 43:21-5a, which uses the phrase, "may retire with full pension rights." The Department is also proposing the addition of N.J.A.C. 12:17-8.3(b)1 and 2, which would contain definitions of the term "involuntarily," when used to describe an individual's separation from employment and the phrase, "date at which the individual may retire with full pension rights." Specifically, N.J.A.C. 12:17-8.3(b)1 would state the following: "For purposes of this subsection, the term, 'involuntarily,' when used to describe an individual's separation from employment shall mean both when an individual has been discharged from employment and when an individual has left work voluntarily with good cause attributable to such work, as the phrase 'good cause attributable to such work' is used within N.J.S.A. 43:21-5." As amended, N.J.A.C. 12:17-8.3(b)2 would read, "For purposes of this subsection, the phrase 'date at which the

## LABOR AND WORKFORCE DEVELOPMENT

### (a)

#### DIVISION OF UNEMPLOYMENT INSURANCE

#### Unemployment Benefit Payments

#### Reduction of Benefits by Retirement in Pension

#### Income and Other Earned Income; Labor Disputes

#### Proposed Amendments: N.J.A.C. 12:17-8.3, 8.4 and 12.2

Authorized By: Thomas D. Carver, Commissioner, Department of Labor and Workforce Development.

Authority: N.J.S.A. 43:21-7g.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2005-349.

A public hearing on the proposed amendments will be held on the following date at the following location:

Friday, October 14, 2005

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.



individual may retire with full pension rights," shall mean the date upon which the claimant has attained the age at which the Internal Revenue Code provides that an individual's receipt of a distribution from a qualified retirement plan is not subject to a 10 percent additional early distribution tax as defined in 26 U.S.C. §72(t)(2)(A)(i).

The Department's concern with regard to the use within existing N.J.A.C. 12:17-8.3(b) of the term "involuntarily," when describing an individual's separation from employment without providing any further explanation of the meaning of that term, is that without the proposed definition, use of the term could be misconstrued to mean only those instances when an individual has been discharged from employment, whereas use of the term when describing an individual's separation from employment is intended to encompass not only those instances when an individual has been discharged from employment, but also those instances when an individual has left work voluntarily with good cause attributable to such work, as the phrase "good cause attributable to such work" is used within N.J.S.A. 43:21-5.

By way of explanation, N.J.S.A. 43:21-5, which addresses disqualification for unemployment benefits, provides in pertinent part that an individual shall be disqualified for benefits for the week in which the individual "has left work voluntarily without good cause attributable to such work." This question of whether an individual "has left work voluntarily without good cause attributable to such work" is the threshold question when determining whether an individual is disqualified for benefits under N.J.S.A. 43:21-5. Conversely, an individual would be qualified for benefits not only when he or she is discharged from employment but also when he or she has left work voluntarily with good cause attributable to such work. For purposes of determining eligibility for unemployment benefits, therefore, the latter of these circumstances, namely, when an individual has left work voluntarily with good cause attributable to such work, would be considered by the Department to fall under the category of having been "involuntarily" separated from employment. Consequently, within N.J.A.C. 12:17-8.3(b), which pertains to the reduction of unemployment benefits resulting from lump sum pension payments and which presupposes that the claimant has qualified for unemployment benefits (in order to discuss a reduction in benefits, one must obviously first be entitled to receive those benefits), it is necessary to read the term "involuntarily," when used to describe an individual's separation from employment, to encompass both discharge from employment and having left work voluntarily with good cause attributable to such work, as the term "good cause attributable to such work" is used within N.J.S.A. 43:21-5.

As indicated earlier, the Department also proposes that within N.J.A.C. 12:17-8.3(b), the phrase "without penalty to his or her pension rights" be replaced by the phrase "with full pension rights," so as to ensure consistency with N.J.S.A. 43:21-5a, the law which addresses reduction of unemployment benefits resulting from receipt of pension payments. Moreover, in order to explain what is meant when the Department speaks of retirement with full pension rights, it is proposed that N.J.A.C. 12:17-8.3(b)2 be added. The new paragraph would state that for purposes of this subsection, the phrase, "date at which the individual may retire with full pension benefits," shall mean the date upon which the claimant has attained the age at which the Internal Revenue Code provides that an individual's receipt of a distribution from a qualified retirement plan is not subject to a 10 percent additional early distribution tax as defined in 26 U.S.C. §72(t)(2)(A)(i).

N.J.A.C. 12:17-8.3(b) currently refers to "the date at which the individual may retire without penalty to his or her pension rights." It is the Department's belief that by citing specifically to the Federal standard for determining whether one may retire without penalty to his or her pension rights, and, therefore, whether one may retire "with full pension rights," claimants and employers will more readily understand the standard being applied by the Department when determining, under N.J.A.C. 12:17-8.3(b), whether one's unemployment benefits will be reduced by the amount of pension payments received.

The Department is proposing amendments to N.J.A.C. 12:17-12.2 in order to comply with P.L. 2005, c. 103, which provides in pertinent part that no disqualification for receipt of unemployment benefits under N.J.S.A. 43:21-5(d) shall apply if it is shown that the claimant has been prevented from working by the employer, even though the claimant's

recognized or certified majority representative has directed the employees in the individual's collective bargaining unit to work under the preexisting terms and conditions of employment and the employees had not engaged in a strike immediately before being prevented from working. In other words, P.L. 2005, c. 103, directs that employees who are "locked out" by their employer shall not be prevented from receiving unemployment benefits.

The proposed amendment to N.J.A.C. 12:17-12.2(a)2 would delete from the definition of the phrase "stoppage of work" the following sentence: "There is no distinction made with regard to whether the work stoppage is caused by a strike or a lockout." The proposed amendments to N.J.A.C. 12:17-12.2(c) would mirror word-for-word the language of the statute, indicating that no disqualification for receipt of unemployment benefits under N.J.S.A. 43:21-5(d) shall apply if the claimant has been prevented from working by the employer, even though the claimant's recognized or certified majority representative has directed the employees in the individual's collective bargaining unit to work under the preexisting terms and conditions of employment and the employees had not engaged in a strike immediately before being prevented from working.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

#### Social Impact

The proposed amendments to N.J.A.C. 12:17-8.3 would have a positive social impact in that they would provide guidance to those reading the rule as to the standards being applied by the Department when determining whether a lump sum pension payable to an individual will result in a reduction in that individual's unemployment benefits. Specifically, whereas existing N.J.A.C. 12:17-8.3 speaks of when an individual is "involuntarily" separated from employment and when an individual "may retire without penalty to his or her pension rights," the proposed amendments would explain what is meant by "involuntarily" when describing an individual's separation from employment and would, further, direct the reader to the standard applied by the Federal government regarding when an individual may retire without penalty to his or her pension rights.

The proposed amendment to N.J.A.C. 12:17-8.4, specifically, the deletion of N.J.A.C. 12:17-8.4(c), would, as the court in *Geisler* observed, serve the purpose of the pension offset statute (N.J.S.A. 43:21-5a), which is "to prevent an individual who is retired from employment or who is involuntarily and permanently separated from employment at a time when he or she is entitled to full pension benefits from collecting both unemployment benefits and retirement benefits based on the same prior work period." *Id.* at 32. In other words, the proposed amendment would prevent withdrawals from the unemployment compensation fund which are not consistent with the overall purpose of the unemployment compensation law. The elimination of these unwarranted withdrawals from the unemployment compensation fund would benefit those throughout the State who depend on the monies in the fund to sustain them during periods of unemployment and would also benefit those who are required by law to contribute to the fund.

The social impact of the proposed amendments to N.J.A.C. 12:17-12.2 would be that a segment of the workforce which has, heretofore, suffered the burdens associated with involuntary unemployment without any assistance under either the unemployment compensation law or the rules promulgated in accordance therewith would now, under the amended rule, be eligible for such assistance. As indicated at N.J.S.A. 43:21-2 with regard to the creation of a system of unemployment compensation within the State, "[i]nvoluntary unemployment is ... a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family." With its passage of P.L. 2005, c. 103, the legislature has taken such appropriate action to lighten the burden upon the unemployed worker and his family caused by a particular type of involuntary unemployment; specifically, that caused by "lockout." It is in accordance with the provisions of P.L. 2005, c. 103, that the Department proposes to amend N.J.A.C. 12:17-12.2.



## Economic Impact

The proposed amendments to N.J.A.C. 12:17-8.3 would have no economic impact, since as indicated in the Summary above, they would not change the manner in which the unemployment compensation system is administered, but rather, would precisely define the existing concepts of involuntary separation from employment and retirement with full pension rights. The purpose of these proposed amendments would be to allow claimants and employers to better understand when an individual's unemployment benefits are offset by the receipt of pension payments.

The proposed amendment to N.J.A.C. 12:17-8.4 would have a negative economic impact on claimants who, prior to the proposed amendment, would have been permitted to collect unemployment benefits without reduction due to the transfer of an eligible rollover distribution from a qualified trust to an eligible retirement plan. However, as explained in the Summary above, under the holding in *Geisler*, the rollover of a pension distribution into another eligible retirement plan, such as an IRA, does not under the unemployment compensation law exempt the claimant from the requisite reduction in his or her unemployment compensation benefits. The Department is proposing to amend N.J.A.C. 12:17-8.4 in the manner described above in strict compliance with the holding in *Geisler*.

The proposed amendments to N.J.A.C. 12:17-8.4 would have a positive economic impact on both the unemployment compensation fund and employers who are required by law to make contributions to the fund based on their unemployment experience. Specifically, the elimination of the regulatory exemption from the offset of unemployment benefits due to pension rollover, would result in fewer withdrawals from the fund and could also result in lower unemployment experience ratings for affected employers.

The proposed amendments to N.J.A.C. 12:17-12.2 would have a positive economic impact on individuals who have been prevented from working by their employer even though the individual's recognized or certified majority representative has directed the employees in the individual's collective bargaining unit to work under the preexisting terms and conditions of employment and the employees have not engaged in a strike immediately before being prevented from working. Specifically, those individuals would be permitted to collect unemployment benefits, whereas prior to the proposed amendment, those individuals would have been disqualified for unemployment benefits if they were unemployed due to a work stoppage which occurred because of a labor dispute, regardless of whether that work stoppage had been caused by a strike or a lockout. The proposed amendments to N.J.A.C. 12:17-12.2 would have an adverse economic impact on both the unemployment compensation fund and employers who are required by law to make contributions to the fund based on their unemployment experience. Specifically, permitting "locked out" employees to collect unemployment benefits would result in an increase in withdrawals from the fund and could also result in higher unemployment experience ratings for affected employers. However, the Department hastens to add that over the past three years, only approximately 200 claimants have been separated from employment due to "lockout." Based on this experience, the Department anticipates a *de minimis* economic impact on employers from the proposed amendments to N.J.A.C. 12:17-12.2 due to increases in unemployment contribution experience ratings.

## Federal Standards Statement

The proposed amendments do not exceed standards or requirements imposed by federal law. Specifically, the subject rules are consistent with the Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq., and the regulations promulgated in accordance therewith, 20 CFR §§610 et seq. Consequently, a Federal standards analysis is not required.

## Jobs Impact

The proposed amendments would have no impact on either the generation or loss of jobs.

## Agriculture Industry Impact

The proposed amendments would have no impact on the agriculture industry.

## Regulatory Flexibility Analysis

The proposed amendments would impose no reporting, recordkeeping or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. However, with regard to potential adverse economic impact on small businesses, as described in the Economic Impact statement above, permitting "locked out" employees to collect unemployment benefits could result in higher unemployment experience ratings for affected employers. However, as also indicated in the Economic Impact statement above, based on the Department's past experience with claimants separated from employment due to "lockout," it does not anticipate that many employers, including small businesses, would be affected by the proposed rule changes. Moreover, the proposed amendments to N.J.A.C. 12:17-12.2 are required by P.L. 2005, c. 103, which recently amended the Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq.

## Smart Growth Impact

The proposed amendments would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

## 12:17-8.3 Lump sum pension reduction

## (a) (No change.)

(b) The lump sum pension payable to an individual, who is involuntarily and permanently separated from employment prior to the date at which the individual may retire [without penalty to his or her pension rights] with full pension rights, shall be assigned to the week in which the individual receives the lump sum payment or, at the claimant's option, may be prorated pursuant to (a) above.

1. For purposes of this subsection, the term "involuntarily," when used to describe an individual's separation from employment, shall mean both those instances when an individual has been discharged from employment and those instances when an individual has left work voluntarily with good cause attributable to such work, as the phrase "good cause attributable to such work" is used within N.J.S.A. 43:21-5.

2. For purposes of this subsection, the phrase "date at which the individual may retire with full pension rights" shall mean the date upon which the claimant has attained the age at which the Internal Revenue Code provides that an individual's receipt of a distribution from a qualified retirement plan is not subject to a 10 percent additional early distribution tax as defined in 26 U.S.C. §72(t)(2)(A)(i).

## 12:17-8.4 Constructive receipt of pension, retroactive receipt of pension and rollovers of pension distributions

## (a)-(b) (No change.)

[(c) There will be no reduction of benefits where there is a transfer of an eligible rollover distribution from a qualified trust to an eligible retirement plan (as defined under section 402(c)(8) of the Internal Revenue Code of 1986), if all the requirements of section 402 of the Internal Revenue Code are met within 60 days of receipt by the individual.]

## 12:17-12.2 Labor disputes

(a) The following words and terms, as used in this section, shall have the following meanings:

## 1. (No change.)

2. "Stoppage of work" means a substantial curtailment of work which is due to a labor dispute. Justification for the labor dispute may not be considered. An employer is considered to have a substantial curtailment of work if not more than 80 percent of the normal production of goods or services is met. [There is no distinction made with regard to whether the work stoppage is caused by a strike or a lockout.]

## (b) (No change.)

(c) A claimant shall not be disqualified for benefits in accordance with N.J.S.A. 43:21-5(d):

1. If the claimant has been prevented from working by the employer, even though:

i. The individual's recognized or certified majority representative has directed the employees in the individual's collective bargaining unit to work under the preexisting terms and conditions of employment; and

ii. The employees had not engaged in a strike immediately before being prevented from working;

Recodify existing 1.-3. as 2.-4. (No change in text.)

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